

THE CLARK CONSTRUCTION
GROUP, INC.

CONTRACT NO. V101BC-0036

VABCA-5674R

VA MEDICAL CENTER
WEST PALM BEACH, FLORIDA

Axel Bolvig, III, Esq., Bradley, Arant, Rose & White, LLP, Birmingham, Alabama, for the Appellant, Clark Construction Company, *Herman M. Braude, Esq., Stuart H. Sakwa, Esq., and Robert Windus, Esq.* Braude and Margulies, P.C. for the real party in interest, The Poole and Kent Company.

Kenneth B. MacKenzie, Esq., Trial Attorney; *Charlma J. Quarles, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY
ON
THE PARTIES' MOTIONS FOR RECONSIDERATION**

Both the Appellant real party in interest, The Poole and Kent Company (PKC), and the Respondent, Department of Veterans Affairs (VA), have timely moved for reconsideration of our decision in *The Clark Construction Group*, VABCA No. 5674, 00-1 BCA ¶ 30,870. Familiarity with this decision is presumed.

We have before us the VA's and PKC's MOTIONS FOR RECONSIDERATION and PKC's OPPOSITION TO GOVERNMENT'S MOTION FOR RECONSIDERATION. The VA opposes PKC's MOTION but elected not to file a response.

DISCUSSION

GENERAL

We have consistently held that the primary purpose of reconsideration is to allow a party to present significant, newly discovered evidence or evidence not readily available at the time of the principal decision. In addition, we will grant a MOTION FOR RECONSIDERATION when the principal decision is based, to some extent, on the Board's own material mistake or oversight. MOTIONS FOR RECONSIDERATION which do not allege newly discovered evidence and which merely repeat arguments, which were fully considered by the Board in reaching its decision, are ordinarily denied. *Nitro Electrical Corporation*, VABCA No. 3777R, 95-2 BCA ¶ 27,672; *Saturn Construction Co., Inc.*, VABCA No. 2600R, 88-3 BCA ¶ 21,183; *Dawson Construction Company, Inc.*, VABCA No. 1711, 85-1 BCA ¶ 17,788.

We will discuss each MOTION separately in light of the standards noted above.

APPELLANT'S MOTION FOR RECONSIDERATION

PKC asks us to reconsider our decision in two areas: 1) The amount awarded for the labor inefficiency of United Sheet Metal Company (USM) resulting from the wet exterior site conditions; and, 2) The Board's negative inference as to whether the contemporaneous project records supported PKC's inefficiency claims.

With regard to the amount awarded for USM's productivity losses, PKC asserts that we should have applied the 5% inefficiency factor to USM's estimated man-hours for 1992 and awarded USM \$23,391 for productivity losses due to wet exterior site conditions in addition to the \$10,000 we did award. To support this proposition, USM cites us to its MAIN BRIEF as a demonstration that the Board erroneously construed the USM \$10,000 trucking cost claim as the total additional cost incurred by USM due to the wet exterior conditions. A close

review of the principal decision reveals that the Board found that the record supports a finding that PKC proved only the \$10,000 as the additional costs experienced by USM because of the muddy exterior site conditions. Although, PKC's expert did perform a truncated Mechanical Contractors Association of America (MCAA) productivity factors analysis of USM's work, Mr. Tammaro's testimony, the cost evidence, and the other relevant portions of the record demonstrate that PKC sufficiently proved only USM's \$10,000 of costs for the additional efforts required because of the exterior site conditions.

PKC "takes exception" to the Board's negative inference that contemporaneous project records did not support PKC's inefficiency claims because of PKC's failure to cite to the records in either the hearing or the briefs. PKC asserts that the size of the Record, the difficulties it had in retrieving records from the CD ROM Appeal Files prepared by Clark Construction Group, the Board's finding of VA liability and, the testimony of its experts and project management personnel as the reason there is "no basis" for the negative inference. PKC also refers us to the Court of Claims assessment in *Luria Bros. and Company v. United States*, 369 F.2d 701 (Ct.Cl. 1966) that it is difficult to prove the costs of lost productivity from project books and records as excusing

its failure to present contemporaneous project records. In effect, PKC maintains that it carried its burden to prove VA liability for all of the claimed loss of labor productivity and that, in making the negative inference, the Board erred in not finding for PKC in all its claims.

PKC points to no new evidence or mistake by the Board in the principal decision relating to the determination of the amount of the additional costs incurred by USM due to the exterior site conditions. Also, the principal decision explains thoroughly and in detail the reasons for the Board's inference concerning the contemporaneous project records. The excuses and other reasons proffered by PKC for its failure to propound the contemporaneous project records are neither newly discovered evidence nor indicative of a material oversight or error by the Board. Thus we find nothing in PKC's MOTION requiring our reconsideration of the principal decision.

THE VA'S MOTION FOR RECONSIDERATION

The VA asks us to reconsider the principal decision in three areas by:

- 1) Revising our finding on productivity losses resulting from the change in sequence to factor out construction of the center and east wings; 2) Reversing the finding that the Stop Pump Orders made the VA responsible for the mucky exterior conditions; and, 3) Revising the application of the MCAA factors and the calculation of quantum to reduce the total amount awarded to \$229,981. The VA styles its MOTION as a MOTION FOR RELIEF FROM JUDGMENT pursuant to Rule 60 of the *FEDERAL RULES OF CIVIL PROCEDURE* (FRCP). The VA specifically points us

to FRCP 60(b) (1) and (6) the text of which is as follows:

FRCP 60, “Relief from Judgment or Order,”

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;.... (6) any other reason justifying relief from the operation of the judgment.

While we have analogized our Rule 29 to *FRCP 60*, the standards by which we continue to assess MOTIONS FOR RECONSIDERATION are those discussed above. *FRCP 60(b)(1)* is equivalent to our “material mistake or oversight” standard we have previously stated. *Sentry Insurance, a Mutual Company*, VABCA No. 2617R, 92-3 BCA ¶ 25,147. We have made it clear that we will apply *FRCP 60(b)(6)*, only in “extraordinary circumstances.” *Nitro Electrical Corporation*, VABCA No. 3777R, 99-1 BCA ¶ 30,195. The VA has neither alleged nor presented any extraordinary circumstances that would trigger application of *FRCP 60(b)(6)*. Thus, we will review the VA’s MOTION under our material mistake or oversight standard.

The VA cites us to various project photographs and schedule updates in the Record to support its request that we revise our assessment of productivity losses due to the resequencing of the project from a horizontal to vertical construction method. Although not expressly stated in its MOTION, we presume the VA asserts that we materially erred in our decision in not considering the evidence cited. The principal decision provides a detailed, pellucid explication of the basis for its finding that PKC was entitled to recover for lost labor

productivity resulting from the resequencing. The evidence cited by the VA provides evidence of concurrent work on the East and Center Wings, a fact we acknowledged in the principal decision. The fact that the construction of the East and Center Towers was, to some extent, concurrent does not alter PKC's entitlement for the effects of the resequencing on its productivity.

The VA apparently believes the Board also erred in finding PKC entitled to recover for productivity losses caused by the mucky exterior site conditions it experienced because the Contract had no requirement that Clark keep the areas around the buildings dry and the wet conditions were the result of normal Florida rainfall conditions. Based on this, the VA asserts that the VA is not liable for the wet exterior site conditions caused by the rainfall. The Contract terms with regard to dewatering are immaterial to our finding that PKC was entitled to recover the costs of productivity losses caused by the wet exterior site conditions. In the principal decision, we specifically found that the dewatering system installed by Clark would have provided a stable, dry site. We also found, as a fact, that the exterior conditions at the site were mucky because Clark was prevented from operating its dewatering system due to the VA's failure to obtain proper permits from State authorities. Since PKC reasonably anticipated dry exterior site conditions, the mucky conditions it experienced early in the project constituted a change to working conditions that lowered its productivity. The VA, again, simply reargues its position that it was not liable for the additional costs incurred by PKC due to wet exterior site conditions; we rejected that argument in the principal decision and we reject it now.

The VA presents us with a proposed alternative quantum analysis using the MCAA productivity factors that would substantially reduce the amount awarded PKC for both labor inefficiency and the additional costs of producing

the coordination drawings. We will not consider this alternative analysis. The VA, other than objecting to any reliance on the MCAA factors because of their “subjectivity”, presented nothing to the Board suggesting that the MCAA factors should be applied in a manner different than that presented by PKC in its exhaustive testimony, the detailed reports of its expert and its extensive briefing. We clearly explained in the principal decision that our determination of the quantum was done on jury verdict basis. By definition, a “jury verdict” entails substantial discretion and subjective judgment by the Board. The VA neither asserts that our use of a “jury verdict” was improper nor does it point to any error or mistake in the construction of our jury verdict. The VA’s MOTION does nothing more than provide argument to support its request that we substitute the VA’s judgment and discretion for that of the Board.

Finally, the VA makes an interesting argument that the Board should not have awarded any overhead or profit to PKC because the parties mutually resolved other, time related Contract claims under the Contract SUSPENSION OF WORK clause that were rooted in the Stop Pump Orders. Because the clause proscribes payment of profit on suspension costs and because both PKC and USM were paid amounts for field and home office overhead in the prior settlements, the VA asserts that PKC can recover only the direct costs of the loss of efficiency or the additional coordination drawing costs. We are unsure, (the VA fails to cite either law or rationale to support its position) how the prior settlements, not part of the Record in this appeal, are relevant to our computation of the amount awarded PKC. As best we can ascertain, the gist of the VA argument is that, since the root cause of the loss of productivity costs and the additional coordination drawing preparation costs was the Stop Pump Orders

and because of the prior settlements, the computation of the amount awarded PKC must be made under the terms of the SUSPENSION OF WORK clause.

In *Centex Bateson Construction Co., Inc.*, VABCA No. 4613, 5162-65, 99-1 BCA ¶ 30,153; *aff'd*, *Centex Bateson Construction Co. v. West* __ F.3d __ (Fed. Cir., July 6, 2000), 2000 WL 898731, we held that claims for loss of labor productivity in a construction contract are constructive change claims under contract CHANGES provisions. We expressly stated in the principal decision that the loss of efficiency and additional coordination drawing effort for which we found the VA liable were constructive changes to the Contract. Therefore, PKC is entitled to an equitable adjustment computed under the terms of the Contract CHANGES-SUPPLEMENT (FOR CHANGES COSTING \$500,000 OR LESS) clause and its recovery is limited by neither the SUSPENSION OF WORK clause nor any prior settlements by the parties under the terms of that clause.

In sum, the VA's MOTION either simply reargues its previous positions or provides new argument unsupported by the Record or applicable precedent. The VA presents neither new evidence nor identifies a material mistake that would support our reconsideration of the principal decision.

DECISION

For the forgoing reasons, the Appellant real party in interest, The Poole and Kent Company's and the Respondent's MOTIONS FOR RECONSIDERATION of the Board's decision in *The Clark Construction Group*, VABCA-5674, 00-1 BCA ¶ 30,870 are **DENIED**.

DATE: **July 12, 2000**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

GUY H. MCMICHAEL III
Chief Administrative Judge

JAMES K. ROBINSON
Administrative Judge